Remarks:

No claim amendments have been presented in this paper. Claims 3–5, 7, 10, 12, 13, 15 and 18 are pending.

Applicant wishes to thank the Examiner for the courtesy of the telephonic interview held on January 5, 2012. During the interview, the undersigned advised the Examiner that the European equivalent of the present application is granted, and that the granted European patent was opposed by a third party (Thai Union International, Inc.). The European Patent Office rejected the opposition and upheld the patent. A copy of the decision of the European Patent Office upholding the European patent is attached as **Exhibit A**.

Doerter, Peterson, Byrd, Air Liquide and Sugisawa

Claims 3–5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,268,189 to Doerter ("Doerter"), in view of the combination of Peterson, M. E., et al., "Heat-Pasteurization Process for Inactivation of Nonproteolytic Types of Clostridium botulinum in Picked Dungeness Crabmeat," Journal of Food Protection 60(8) (1997): 928-934 ("Peterson'), U.S. Patent No. 2,546,428 to Byrd ("Byrd"), Air Liquide Canada, "Packaging and Preserving Fish and Sea Products" (Abstract Only) ("Air Liquide"), and U.S. Patent No. 4,840,805 to Sugisawa et al. ("Sugisawa"). The rejections are respectfully traversed.

For the reasons outlined below, the prior art of record would not motivate a person having ordinary skill in the art to apply the teachings of Sugisawa to crabmeat, let alone to modify a flexible pouch containing crabmeat to include an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

Doerter discloses a process for packing shellfish, such as crab, in a container. Specifically, Doerter discloses a process including the steps of: (1) packing the shellfish in the container, (2) filling the container with a mixture of carrageenan and water such that "[t]he mixture fills the container and effectively forces any air from the container, leaving only shellfish and the carrageenan mixture" (*Doerter*, col. 3, ll. 8–10), (3) hermetically sealing the container, (4) sterilizing or pasteurizing the container and (5) cooling the

container.

Thus, Doerter does not disclose an ambient air to crabmeat ratio of about 13 to 20 percent by volume. To the contrary, Doerter teaches using a mixture of carrageenan and water to "effectively [force] any air from the container, leaving only shellfish and the carrageenan mixture." (*Id.* at col. 3, 11. 8-10.) Therefore, Doerter encourages the complete removal of ambient air from the package, thereby teaching away from the claimed packaged crabmeat product and packaging method.

Peterson discloses the concept of pasteurizing flexible pouches packed with Dungeness crabmeat. However, Peterson does not disclose or suggest an ambient air to crabmeat ratio within the flexible pouch of about 13 to 20 percent by volume.

Byrd discloses a method for packaging fresh shellfish in a container including the steps of: (1) packaging shellfish meat in the container, (2) sealing the container with a minimized amount of air therein, (3) heating the sealed container to 171 °F, (4) cooling the heated container and (5) refrigerating the container until consumed. Specifically, Byrd discloses that the containers packed with shellfish meat are "vacuumized by any known method, if possible, but, if not, are packed more tightly in order to reduce to the minimum undesired air space between the particles of crab meat." (*Byrd*, col. 2, ll. 44–48.)

Thus, Byrd does not disclose an ambient air to crabmeat ratio of about 13 to 20 percent by volume. To the contrary, Byrd teaches minimizing the amount of ambient air in the container by, for example, vacuumizing or tightly packing the crabmeat into the container. Therefore, like Doerter, Byrd suggests that ambient air is detrimental to the packaged product and teaches creating the anaerobic environment that the claimed ambient air to crabmeat ratio is intended to avoid, thereby teaching away from the claimed packaged crabmeat product and packaging method.

Air Liquide discloses packaging "non-salted, smoked, filleted, eviscerated whole fish and fresh sea products" in gas-tight plastic wrapping or bulk plastic trays or containers. (*Air Liquide*, abstract.) The packaging is subjected to a vacuum to remove all ambient air and then a gaseous atmosphere, consisting of 60–80 percent by volume CO_2 and 20–40 percent by volume oxygen, is introduced to the packaging. (*Id.*)

Air Liquide does not direct a person of ordinary skill in the art to leave a minimum amount of air in a packaged crabmeat product. Rather, Air Liquide teaches the use of a modified gaseous atmosphere that includes oxygen, wherein the oxygen is present to inhibit anaerobic bacterial growth. (*See Declaration of John Keeler, Sr.* (filed July 6, 2009), ¶ 22.) However, Air Liquide is directed to packaging fresh fish and sea products. (*Id.*) The packaged fish and sea products are never subjected to a heat treatment process, such as sterilization or pasteurization. (*Id.*) Therefore, the need for effective and efficient heat transfer is not an issue for the Air Liquide package. (*Id.*) Nor is package bloating and rupture an issue for the Air Liquide package—the package is not heat treated and, therefore, there is no concern about the gases contained in the package expanding. (*Id.*) As such, a person having ordinary skill in the art would not be motivated to apply Air Liquide's teachings regarding packaging fresh fish and sea products to a sealed packaged that undergoes heat treatment. (*Id.* at ¶ 23.)

Thus, Air Liquide does not disclose using ambient air, let alone an ambient air to crabmeat ratio of about 13 to 20 percent by volume. To the contrary, Air Liquide teaches using a modified atmosphere that requires the removal of all ambient air from the package before introducing a modified gaseous atmosphere. As such, Air Liquide teaches away from the claimed packaged crabmeat product and packaging method. Furthermore, Air Liquide's modified atmosphere packaging is not suitable for use with products that undergo heat treatment.

Accordingly, Doerter, Peterson, Byrd and Air Liquide, whether taken alone or in combination, fail to disclose or suggest an ambient air to crabmeat ratio of about 13 to 20 percent by volume. Furthermore, Doerter, Byrd and Air Liquide teach away from an ambient air to crabmeat ratio of about 13 to 20 percent by volume. Therefore, the Examiner's rejections hinge on (1) whether Sugisawa discloses or suggests an ambient air to crabmeat ratio of about 13 to 20 percent by volume and (2) whether Sugisawa is properly combinable with Doerter, Peterson, Byrd and Air Liquide.

Sugisawa discloses a process for packaging fish that prevents the formation of drips on the fish. In particular, the process includes the steps of: (1) drying the fish, preferably to

55 to 75 percent by weight water, (2) broiling the dried fish to a specific hardness, preferably 240 to 850 grams, (3) hermetically packaging the broiled fish in a container, and (4) heat sterilizing the packaged container. The hermetically packaging step is preferably a vacuum packaging process "so that the air content is 25% or less, preferably 15% or less, relative to total volume of air and the broiled fish in the container." (*Sugisawa*, col. 3, ll. 9–12.) The vacuum packaging process improves the sterilization effect obtained during the heat sterilization step and prevents the flow of drips from the fish and the breaking of the fish meat during the heat sterilization step. (*Id.* at col. 3, ll. 12–16.)

Thus, Sugisawa discloses packaging dried, broiled fish (not crabmeat), using a vacuum sealing process to remove as much air as possible (not to an ambient air to crabmeat ratio of about 13 to 20 percent by volume) and sterilizing (not pasteurizing) the sealed product.

Applicant submits that (1) Sugisawa does not disclose or suggest an ambient air to crabmeat ratio of about 13 to 20 percent by volume and (2) a person having ordinary skill in the art would not be motivated to apply the teachings of Sugisawa to crabmeat.

Sugisawa teaches that "[i]t is particularly preferable to conduct vacuum packaging so that the air content is 25% or less, preferably 15% or less, relative to total volume of air and the broiled fish in the container." (*Id.* at col. 3, ll. 9–12.) When read in context, this portion of Sugisawa teaches one skilled in the art that the purpose of vacuum packaging is to improve sterilization. (*See Declaration of John Keeler, Sr.*, ¶ 18.)

Sterilization is improved by vacuum packaging because vacuum packaging removes air from the package. (*Id.* at ¶ 19.) Air is an insulator and, therefore, its presence in a package slows the transfer of heat from the surrounding sterilization unit to the fish. (*Id.*) The more air in a package, the longer it takes to heat the fish in the package to the desired sterilization temperature. (*Id.*) Inversely, less air in the package means less insulation, greater heat flux and, consequently, improved sterilization. (*Id.*) The improvement in sterilization effect is directly related to the amount of air removed from the package. (*Id.*)

Thus, a person of ordinary skill in the art reading Sugisawa's teaching that sterilization is improved when the air content in the package "is 25% or less, preferably

15% or less" would be led to remove as much air from the package as possible. (*Id.* at ¶ 20.) Sugisawa provides these values as a tolerance range—a maximum amount of air—not as a calculated minimum amount or air. (*Id.*) Nothing in Sugisawa would direct a person having ordinary skill in the art to intentionally leave a certain minimum amount of air in the package. (*Id.*)

Accordingly, a person having ordinary skill in the art would understand Sugisawa as teaching removing as much air from the package as possible to improve heat transfer during sterilization—not to intentionally leave a minimum amount of air in the package. As such, Sugisawa does not disclose or suggest an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

On its face, Sugisawa expressly limits its teachings to sterilized, dried, broiled fish. Specifically, Sugisawa states that "[t]he inventors of the present invention have **specifically limited** the food to broiled fish and have concentrated on a technique for increasing the preservative capability thereof by a heat sterilizing treatment." (*Sugisawa*, col. 1, ll. 14–19 (emphasis added).)

Crabmeat is not fish. (*Declaration of John Keeler, Sr.*, ¶ 14.) Crabmeat is harvested from crabs, which are crustaceans (i.e., invertebrate animals with hard exoskeletons and jointed legs). (*Id.*) Fish is meat harvested from fish (i.e., aquatic vertebrates with fins). (*Id.*) While crustaceans are sometimes referred to as "shellfish," the presence of the word "fish" in the word "shellfish" does not render a shellfish a fish. (*Id.*)

The microbiological properties of crabmeat are uniquely different than the microbiological properties of fish. (*Id.* at ¶ 15.) Most notably, crabmeat typically carries a greater concentration and variety of bacterial flora than fish and, therefore, crabmeat spoils easier and quicker than fish. (*Id.*) Furthermore, the texture that typical consumers expect of crabmeat is much different than the texture expected of fish. (*Id.* at ¶ 16.) The typical consumer expects crabmeat to have a soft, delicate texture, a natural color and a sweet taste, which are best preserved by pasteurization. (*Id.*) Fish is expected to be flakey and, therefore, can be sterilized. (*Id.*)

Sterilization is a harsher process than pasteurization and, therefore, is not a desirable

heat treatment process for crabmeat. (*Id.*) Specifically, sterilized crabmeat loses its natural texture, color and taste. (*Id.*) As such, sterilized crabmeat is typically infused with various chemical agents to preserve color. However, such chemical agents adversely affect the taste of the treated crabmeat. (*Id.*)

Thus, the packaging considerations for crabmeat are different than the packaging considerations for fish. (*Id.* at ¶ 17.) Furthermore, the considerations for pasteurized crabmeat are different than the considerations for sterilized crabmeat. (*Id.*) Therefore, a person having ordinary skill in the art would not consider the teachings of Sugisawa as being relevant to the crabmeat packaging industry, let alone to the pasteurized crabmeat packaging industry. (*Id.* at ¶ 13.) As such, a person having ordinary skill in the art would not be motivated to apply the teachings of Sugisawa to crabmeat. (*Id.* at ¶ 17.)

Accordingly, the combination of Doerter, Peterson, Byrd, Air Liquide and Sugisawa fails to disclose or suggest pasteurized crabmeat sealed in a flexible pouch at an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

Furthermore, evidence of commercial success presented during prosecution rebuts the Examiner's contentions of obviousness. On March 12, 2010, Applicant submitted the declaration of John Keeler, Jr., president of John Keeler & Co., Inc., assignee of the present patent application. Mr. Keeler's declaration establishes that BLUE STAR brand pasteurized crabmeat pouches have enjoyed significant commercial success that is primarily attributable to the advantages associated with packaging pasteurized crabmeat at the claimed ambient air to crabmeat ratio. (*Declaration of John Keeler, Jr.*, ¶¶ 6–13.) Indeed, the United States Food and Drug Administration has never detained or rejected any imported BLUE STAR brand pouches due to (1) decomposition as a result of pouch rupture or (2) the presence of botulism (an anaerobic bacteria), thereby confirming not only the commercial success, but the significance, of the claimed package and method. (*Id.* at ¶ 5.)

Accordingly, Applicant respectfully requests reconsideration and withdrawal of the rejections of Claims 3–5, 7, 10, 12, 13, 15 and 18 based on the combination of Doerter, Peterson, Byrd, Air Liquide and Sugisawa.

Ueyama, Peterson, Air Liquide and Sugisawa

Claims 3–5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent Pub. No. 2002/0061412 to Ueyama et al. ("Ueyama") in view of the combination of Peterson, Air Liquide and Sugisawa. The rejections are respectfully traversed.

The Examiner contends that claims 3–5, 7, 10, 12, 13, 15 and 18 are obvious over the combination of Ueyama, Peterson, Air Liquide and Sugisawa. Peterson, Air Liquide and Sugisawa are discussed in detail above. For the reasons discussed below, Ueyama fails to remedy the shortcomings of Peterson, Air Liquide and Sugisawa.

Ueyama discloses a heat-shrinkable multilayer film for packaging, among other things, foods having projections (e.g., crabs), fish meat and other marine products. (*Ueyama*, ¶ 66.) However, Ueyama fails to disclose pasteurization or an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

Significantly, Ueyama teaches a multi-layered film that shrinks when subjected to heat (e.g., hot water at 80 to 90 °C). (*Id.* at ¶ 33.) Therefore, if the teachings of Ueyama were applied to the claimed flexible pouch, the pouch would shrink during the pasteurization process, thereby rendering it difficult, if not impossible, to achieve the desired ambient air to crabmeat ratio of about 13 to 20 percent by volume.

Thus, not only does Ueyama fail to disclose or suggest a packaged crabmeat product having an ambient air to crabmeat ratio of about 13 to 20 percent by volume, Ueyama's shrinking pouch would make it difficult to achieve the claimed ambient air to crabmeat ratio. Therefore, Ueyama fails to remedy the shortcomings of Peterson, Air Liquide and Sugisawa addressed above.

Accordingly, Applicant respectfully requests reconsideration and withdrawal of the rejections of Claims 3–5, 7, 10, 12, 13, 15 and 18 based on the combination of Ueyama, Peterson, Air Liquide and Sugisawa.

Lett, Peterson, Air Liquide, Doerter and Sugisawa

Claims 3–5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over GB 2,343,611 to Left et al. ("Left") in view of the combination of

Peterson, Air Liquide, Doerter and Sugisawa. The rejections are respectfully traversed.

The Examiner contends that claims 3–5, 7, 10, 12, 13, 15 and 18 are obvious over the combination of Lett, Peterson, Air Liquide, Doerter and Sugisawa. Peterson, Air Liquide, Doerter and Sugisawa are discussed in detail above. For the reasons discussed below, Lett fails to remedy the shortcomings of Peterson, Air Liquide, Doerter and Sugisawa.

Lett discloses a method for packaging crab including the steps of: (1) optionally wrapping the crab in parchment, (2) placing the crab in a pouch of plastics material, (3) adding brine to the pouch, (4) vacuum sealing, and (5) pasteurizing the sealed pouch. (*Lett*, p. 11.) However, Lett does not disclose an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

To the contrary, Lett teaches packing crab (whole crab) in a plastic pouch that has been filled with brine and has been vacuum sealed to remove air. Therefore, Lett expressly teaches the removal of air from the package, thereby suggesting that air is detrimental to the final product.

Thus, not only does Lett fail to disclose or suggest a packaged crabmeat product having an ambient air to crabmeat ratio of about 13 to 20 percent by volume, let teaches away from an ambient air to crabmeat ratio of about 13 to 20 percent by volume. Therefore, Lett fails to remedy the shortcomings of Peterson, Air Liquide, Doerter and Sugisawa addressed above.

Accordingly, Applicant respectfully requests reconsideration and withdrawal of the rejections of Claims 3–5, 7, 10, 12, 13, 15 and 18 based on the combination Lett, Peterson, Air Liquide, Doerter and Sugisawa.

Walker, Ueyama and Sugisawa

Claims 3–5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 3,852,486 to Walker et al. ("Walker") in view of the combination of Ueyama and Sugisawa. The rejections are respectfully traversed.

The Examiner contends that claims 3–5, 7, 10, 12, 13, 15 and 18 are obvious over the combination of Walker, Ueyama and Sugisawa. Ueyama and Sugisawa are discussed above. For the reasons discussed below, Walker fails to remedy the shortcomings of Ueyama and

Sugisawa.

Walker discloses a method for preserving shellfish, such as crab, by (1) partially cooking the crab to remove the meat, (2) dipping the cooked meat into a chlorine solution, (3) impregnating the cooked meat with an aqueous solution of an inorganic chloride (e.g., sodium chloride), an antibacterial agent (e.g., sodium nitrate), and an organic acid (e.g., citric acid), (4) placing the impregnated meat into a container, (5) pasteurizing the impregnated meat and (6) sealing the container.

Walker does not disclose an ambient air to crabmeat ratio of about 13 to 20 percent by volume. To the contrary, Walker teaches impregnating shellfish meat with an aqueous solution having a bacteriostatic effect (col. 3, 11. 39-41), thereby obviating the need for an ambient air to crabmeat ratio of 13 to 20 percent by volume. Therefore, Walker fails to remedy the shortcomings of Ueyama and Sugisawa addressed above.

Accordingly, Applicant respectfully requests reconsideration and withdrawal of the rejections of Claims 3–5, 7, 10, 12, 13, 15 and 18 based on the combination Walker, Ueyama and Sugisawa.

Conclusion

In view of the foregoing, Applicants submit that the pending claims of the present application are in condition for allowance. Prompt mailing of a Notice of Allowance is respectfully requested.

Respectfully submitted,

/Victor J Wasylyna/

July 2, 2012

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CERTIFICATE OF EFS-WEB TRANSMISSION

I hereby certify that this correspondence is being transmitted to the United States Patent and Trademark Office by way of the EFS-WEB electronic filing system on July 2, 2012:

/Victor J. Wasylyna/

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EXHIBIT A

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Application No. / Patent No.	Ref.	Date
04 025 099.5 - 2114 / 1 526 091 /	OB14482/O19235EP	16.12.2011
Proprietor John Keeler &Co., Inc.		

Decision rejecting the opposition (Art. 101(2) EPC)

The Opposition Division - at the oral proceedings dated 24.11.2011 - has decided:

The opposition(s) against the European patent EP-B- 1 526 091 is/are rejected.
The reasons for the decision are enclosed.

Possibility of appeal
This decision is open to appeal. Attention is drawn to the attached text of Articles 106 to 108 and Rules 97 to 98 EPC.

Opposition Division:

Chairman:	Hillebrecht, Dieter
2nd Examiner:	Graham, Judith
1st Examiner:	Smeets, Dieter

Hue, Sylvie
Formalities Officer
Tel. No.: +49 89 2399-7573

Enclosure(s): 9 page(s) reasons for the decision (Form 2916)
Wording of Articles 106 - 108 and Rules 97 - 98 EPC (Form 2019)
Minutes of oral proceedings
annex 1: Form 2338
annex 2: claims as granted

to EPO postal service: 12.12.11

FACTS AND SUBMISSIONS

1 European Patent N° 1526091 is based on the European patent application N° 04025099.5.

Date of filing: 21.10.2004

Priority date: 21.10.2003

The mention of the grant of the patent has been published in European Patent Bulletin 2007/50 of 12.12.2007.

The **Proprietor** of the patent is

John Keeler & Co., Inc.

Miami

Florida 33172 (US)

2 Notice of opposition to the granted patent was filed on 11.09.2008 by

Thai Union International, Inc.

9330 Scranton Road, Suite 500

San Diego

Ca 92121 (US)

hereafter called the **Opponent**,

requesting revocation of the patent as a whole on the ground of Art. 100(a) EPC because of lack of novelty (Art. 54 EPC) and lack of inventive step (Art. 56 EPC).

Alternatively, oral proceedings were requested.

With his notice of opposition, opponent filed documents E1-E9 (see Form 2338, **annex 1**)

3 With letter dated 19.01.2009, the Proprietor requested the rejection of the opposition and the maintenance of the patent as granted. He also filed an auxiliary request. He further requested E7-E9 not to be admitted into the proceedings in view of Art. 76(2)(c) EPC.

Alternatively, oral proceedings were requested.

4 In a communication dated 18.04.2011, the Opposition division summoned the parties to attend oral proceedings on 24.11.2011 and gave a preliminary non-binding opinion with respect to novelty.

5 With letter of 23.09.2011, the Opponent submitted further arguments with respect to his objections of lack of novelty and lack of inventive step.

6 Oral proceedings were held on 24.11.2011. They were attended by both parties.

7 The requests of the parties at the beginning of the oral proceedings were as follows:

i) Opponent: requesting revocation of the patent as a whole on the ground of Art. 100(a) EPC because of lack of novelty (Art. 54 EPC) and lack of inventive step (Art. 56 EPC)

ii) Proprietor: Maintenance of the patent as granted or according to the main request filed on 19.10.2009.

The Proprietor also requested E7-E9 not to be admitted into the proceedings as the requirements of Rule 76(2)(c) were not met in view of these documents.

8 The text of the claims of the main request is appended to this decision (see **annex 2**)

9 At the end of the oral proceedings, the Opposition Division decided to reject the opposition.

10 For further details about the content of the oral proceedings, attention is drawn to the minutes of the oral proceedings.

REASONS FOR THE DECISION

1 Admissibility of the opposition

The opposition is formally admissible as it complies with the requirements of Art. 99(1) and 100 EPC and Rules 3(1) and 76 EPC. This has not been contested by the Proprietor.

2 Admissibility of E7-E9

2.1 The Proprietor requested E7-E9 not to be admitted into the proceedings as the requirements of Rule 76(2)(c) EPC were not met in view of these documents. He argued that the notice of opposition and the further submissions of the Opponent were silent about the content of E7-E9 and the reason why these documents were considered relevant. Bringing up these documents during the oral proceedings for the first time and selecting E7 as closest prior art extensive arguments therefore results in a clear disadvantage for the Proprietor.

2.2 This Opponent essentially argued that E7-E9 were filed in due time with the notice of Opposition.

2.3 The Opposition Division is of the opinion that the Proprietor's request should not be followed for the following reasons:

E7-E9 were indeed timely submitted with the notice of opposition. Their complexity is also considered low. Hence, the content of these documents and their relevance in view of the ground of opposition according to Art. 100(a) EPC can be easily determined.

Consequently, E7-E9 are admitted into the proceedings.

3 MAIN REQUEST - claims as granted (**annex 2**)

3.1 Novelty (Art. 54 EPC)

3.1.1 The Opponent cited E4 and E1 as novelty destroying documents for the subject-matter of independent claims 1 and 8 of the contested patent.

He argued that E4 (col. 2, l. 39 - col. 3, l.12) disclosed explicitly all the trivial features (providing a packaging vessel, placing crabmeat into the vessel, sealing and pasteurizing the packaging vessel). The feature with respect to the air/crabmeat ratio is not explicitly disclosed but the broad range 6-43% is implicitly encompassed by E4 as the claimed values merely correspond to typical values according to [0007] and [0008] of the description of the contested patent. These values actually correspond to a pack 70% full of crabmeat to a pack 94% full of crabmeat. He also argued that this broad range is not purposively selected. Hence, the selected sub-range "6%-43%" cannot be considered novel.

He argued that similar arguments were of relevance in view of E1 (abstract), a document disclosing the use of flexible pouches as packaging vessels for pasteurized crabmeat.

The Opponent also referred to E6 for illustrating the common general knowledge of the skilled person, working in the field of packaging heat-treated fish products. Said document (col. 3, lines 5-12) explicitly discloses applying a partial vacuum to a package to obtain an air content of 15% or less. This equals a ratio air/fish meat of about 18%. This document further illustrates that the ratios obtained in D1 or D4 must implicitly be somewhere between 6% and 43%.

3.1.2 The Proprietor essentially argued that neither E4 nor E1 disclose the feature "air to crabmeat ratio" as claimed in the contested patent. For a document to be considered novelty destroying, there must be a clear and unambiguous

disclosure of all features of the claim. E4 actually discloses the opposite of claim 1 as it teaches to remove as much air as possible. E1 merely discloses to seal the packages under vacuum. He also pointed out that E6 is a patent application and therefore not suitable to illustrate the common general knowledge of the skilled person.

3.1.3 The Opposition Division is of the opinion that independent claims 1 and 8 of the main request meet the requirements of novelty.

The reasoning of the Opponent cannot be followed for the following reasons:

E4 relates to a method of keeping or preserving the meat of shellfish in a fresh and edible condition for varying periods or lengths of time. On col. 2, lines 44-50 it is disclosed that *"the containers or cans so packed are vacuumized by any known method, if possible, but, if not, are packed more tightly in order to reduce to the minimum undesirable air space between the particles of crab meat. The containers are then hermetically sealed."* Hence, in the Opposition Division's view, this disclosure does not describe a broader range of air to crabmeat ratios from which the range 6-43% is selected. If anything, E4 teaches to minimise the volume of air.

Hence, in view of E4, the feature "air to crabmeat ratio of 6-43% by volume" is a novel feature; it is not to be considered as a "selection" of a previously-disclosed broader range. Consequently, the subject-matter of claims 1 and 8 of the main request is novel in view of said document.

This reasoning applies, *mutatis mutandis*, in view of E1. This document describes that the crab meat is sealed under vacuum. Hence, E1 does not disclose a broader range of air to crabmeat ratios from which the range 6-43% is selected. Consequently, E1 cannot anticipate the subject-matter of independent claims 1 and 8.

It is also pointed out that the passages in [0007] and [0008] of the contested patent cannot be considered as "prior art" in the sense of Art. 54 EPC as the the ratios mentioned therein have not been made available to the public prior to the date referred to in Art. 54(2) EPC.

The teaching of E6 cannot be combined with E4 or E1 for the purposes of a novelty objection. E6 is indeed a patent document which does not constitute common general knowledge of the skilled person and does not deal with crabmeat.

Consequently, claims 1 and 8 of the main request are considered to meet the requirements of Art. 54 EPC.

3.2 Inventive Step (Art. 56 EPC)

3.2.1 The Opponent applied several approaches in his inventive step attack. He emphasized that the feature "air to crabmeat ratio of 6-43% by volume" does not provide any technical effect as it is impossible to decrease growth of both anaerobic and aerobic bacteria at the same time.

In one approach he selected E9 as closest prior art and pointed out that said document incorporates (col. 1, l. 59-60) the teachings of E4. E9 relates to process of preserving shellfish meat explicitly states (col. 1, l.66-67) that pasteurization does not kill spores of *C. botulinum.* E4 includes all the features of claim 1 on file, except the feature "air to crabmeat ratio".

He defined the objective technical problem as finding a suitable packing density, knowing the risks of spoilage of anaerobic and aerobic bacteria. The solution to this problem, namely packing the packages with crabmeat between about 3/4 full to almost completely full, is obvious in view of the teachings of E6, dealing with packaging of heat-treated fish products. Said document (col. 3, lines 5-12) explicitly discloses applying a partial vacuum to a package to obtain an air content of 15% or less. Said document is not limited to high temperature heat sterilization but includes pasteurization temperatures (75°C), see col. 3, l.24-26. Further according to E6, the type of package is not important (col. 3, l. 3-16).

Hence, the Opponent concluded that the subject-matter of claim 1 of the contested patent was obvious in view of E9 in combination with E6, taking into consideration that E9 includes the content of E4.

In a second approach, he selected E1 as closest prior art and argued that the "vacuum" used in E1 is implicitly a partial vacuum. The skilled person, facing the technical problem of providing an appropriate packaging density for the crabmeat, knowing the risks of spoilage of anaerobic and aerobic bacteria, would apply a partial vacuum as taught in E6 (col. 3, l. 5-12), thereby arriving at an air to crabmeat ratio according to claims 1 and 8 of the main request.

In a third approach, the Opponent combined the teachings of E9 with E5, also taking into account that E9 includes the content of E4. E5 teaches packaging fish and sea products in a modified atmosphere containing 60-80 vol.% CO_2 and 40-20 vol.% oxygen. Said document explicitly states that a certain amount of oxygen should be present such that the development of *C. botulinum* is avoided. The skilled person, combining the teachings of E9 with E5, would inevitably have packed the crabmeat pack somewhere a bit under 3/4 full to almost completely full.

3.2.2 The Proprietor essentially argued that E1 should be selected as closest prior art and argued that the distinguishing feature is the air to crabmeat ratio of 6-43% by volume.

He defined the technical problem as striking a balance between preventing the growth of aerobic an anaerobic bacteria.

The solution, having at least some air (as defined in claims 1 and 8) in the package is neither suggested by E1 nor by any of the other prior documents.

He also pointed out that E6 does not relate to crabmeat and does not relate to the problem underlying the contested patent.

3.2.3 The Opposition Division is of the opinion that independent claims 1 and 8 meet the requirements of Art. 56 EPC. The arguments of the Opponent cannot be followed for the following reasons:

3.2.3.1 *In view of E1 as closest prior art, in combination with E6*

Different documents were proposed as closest prior art during the proceedings. In the Opposition Division's view, E1 is closest prior art as it describes a heat-pasteurization process for inactivation of *C. botulinum* in crabmeat, vacuum packaged in oxygen-impermeable flexible pouches (abstract, p.932, left column, last paragraph).

The subject-matter of claim 1 and (claim 8) of the contested patent differs from E1 in that the air to crabmeat ratio is defined as 6-43% by volume. The air to crabmeat ratio is calculated by dividing the volume of free air in the vessel by the volume of crabmeat in the vessel.

The objective technical problem can therefore be formulated (cf. par. [0012] of the patent specification) as striking a balance between the growth of anaerobic and aerobic bacteria.

The solution provided by claim 1 is optimising the amount of air in the container. The limited amount of air limits the amount of oxygen present to reduce the rate at which aerobic bacteria will grow and lead to spoilage of the product. The shelf life of the product is thereby prolonged, without losing the ability of spoilage bacteria to reproduce and warn the consumer should temperature abuse happen. The presence of air in the container will also slow down the reproduction of anaerobic bacteria or its spores that may be present.

E1 discloses a process which extends the refrigerated shelf life by inactivating spores of *C. botulinum* and *L. monocytogenes*. The crabmeat is vacuum packaged in the flexible pouches. Hence, said document merely teaches removing all air from the package. In the absence of evidence to the contrary, the flexible pouch obtained in E1 is considered to have an air to crabmeat

ratio of less than 6%. E1 is silent about any minimum level of air in the package to slow down the reproduction of anaerobic bacteria. E1 is also silent about the ability of packages containing limited amounts of air to detect temperature abuse.

E6 is directed to preservation of broiled fish and states (col. 3, lines 5-16) that "*it is preferable that the broiled fish be packaged in the container under vacuum from the viewpoint of improving the sterilization effect during the heat sterilization. It is particularly preferable to conduct vacuum packaging so that the air content is 25% or less, preferably 15% or less, relative to total volume of air and the broiled fish in the container, because the sterilization effect obtained during the heat sterilization is improved, and the effect of preventing the flow of drips from the fish and the breaking of the fish meat during the heat sterilization is also improved.*" Hence, E6 is not directed to crabmeat and does not concern the technical problem of striking a balance between the growth of anaerobic and aerobic bacteria.

The skilled person, starting from E1 and facing the objective technical problem as defined above, has therefore no incentive to turn to E6 and apply a partial vacuum as taught in E6 to the flexible pouches described in E1.

Thus, the subject-matter of claims 1 and 8 is considered not obvious in view of E1 in combination with E6.

3.2.3.2 *In view of E9 in combination with E6*

E9 describes a process of treating fresh, cooked shellfish meat. E9 indeed refers to E4 (col. 1, l. 58-65) and states that "*E4 recognizes the desirability of heating the shellfish meat in order to destroy bacteria, but does not come to grips with considerations which would render the process feasible for the preservation, packaging and distribution of shellfish meat for the consumer market.*" In E9, the problem of avoiding growth of *C. botulinum* is solved by a process including pasteurization after treatment with aqueous solution of sodium chloride, antibacterial agent and strong organic acid. Hence, the solution of the technical problem in E9 does not rely on the teachings of E4. The latter is merely cited as background art.

The subject-matter of claim 1 and (claim 8) of the contested patent differs from E9 in that the air to crabmeat ratio is defined as 6-43% by volume.

The objective technical problem can therefore be formulated (cf. par. [0012] of the patent specification) as striking a balance between the growth of anaerobic and aerobic bacteria.

E9 does not teach or suggest to optimise the amount of air in the package in order to solve the objective technical problem. E9 is silent about applying a (partial) vacuum, the air to crabmeat ratio and merely states (col. 4, lines 58-63) that the bags are of a type that are readily heat sealed and which act to seal the contents from the atmosphere. In another embodiment of E9, the packages are left unsealed during pasteurization (see col. 6, l.2-56). Even taking into account the disclosure of E4, it is noted that said document teaches that (col. 2, l. 44-50) "*the containers or cans so packed are vacuumized by any known method, if possible, but, if not, are packed more tightly in order to reduce to the minimum undesirable air space between the particles of crab meat. The containers are then hermetically sealed.*" Hence, E4 actually teaches away from having at least an air to crabmeat ratio of minimum 6%.

As already stated above, E6 is not directed to crabmeat and does not concern the technical problem of striking a balance between the growth of anaerobic and aerobic bacteria.

The skilled person, starting from E9 and facing the objective technical problem as defined above, has therefore no incentive to turn to E6 and apply a partial vacuum as taught in E6 to the containers described in E9.

Thus, the subject-matter of claims 1 and 8 is also considered not obvious in view of E9 in combination with E6.

3.2.3.3 *In view of E9 in combination with E5*

The teachings of E9 and the definition of the objective technical problem are already discussed under 3.2.3.2. E5 is an abstract disclosing the packaging of fish and sea products under a modified atmosphere containing 60-80 vol.% CO_2 and 40-20 vol.% oxygen. Said document states that a certain amount of oxygen should be present such that the development of *C. botulinum* is avoided. The fish etc. is introduced into a gas-tight plastic wrapping, a vacuum is created around the perishable foodstuff and the gaseous atmosphere is introduced and the wrapping is sealed. However, said document does not teach a ratio atmosphere/crabmeat in the package and does not concern the use of air. Hence, even combining the teachings of E9 and E5, one cannot arrive at the subject-matter of claims 1 and 8 of the contested patent

In summary, the Opposition Division is of the opinion that claims 1 and 8 of the main request meet the requirements of Art. 56 EPC.

4 As the main request is considered to meet the requirements of the EPC, there is no need to deal with the auxiliary request.

DECISION

The grounds of opposition do not prejudice maintenance of the patent as granted (Art.101(2) EPC).

Article 106
Decisions subject to appeal

(1) An appeal shall lie from decisions of the Receiving Section, Examining Divisions, Opposition Divisions and the Legal Division. It shall have suspensive effect.

(2) A decision which does not terminate proceedings as regards one of the parties can only be appealed together with the final decision, unless the decision allows a separate appeal.

(3) The right to file an appeal against decisions relating to the apportionment or fixing of costs in opposition proceedings may be restricted in the Implementing Regulations.

Rule 97
Appeal against apportionment and fixing of costs

(1) The apportionment of costs of opposition proceedings cannot be the sole subject of an appeal.

(2) A decision fixing the amount of costs of opposition proceedings cannot be appealed unless the amount exceeds that of the fee for appeal.

Rule 98
Surrender or lapse of the patent

The decision of an Opposition Division may be appealed even if the European patent has been surrendered in all the designated Contracting States or has lapsed in all those States.

Article 107
Persons entitled to appeal and to be parties to appeal proceedings

Any party to proceedings adversely affected by a decision may appeal. Any other parties to the proceedings shall be parties to the appeal proceedings as of right.

Article 108
Time limit and form

Notice of appeal shall be filed in accordance with the Implementation Regulations, at the European Patent Office within **two months** of notification of the decision. Notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid. Within **four months** of notification of the decision, a statement setting out the grounds of appeal shall be filed in accordance with the Implementing Regulations.

Further information concerning the filing of an appeal

(a) The appeal is to be filed with the European Patent Office either at its seat in Munich, at its branch at The Hague or at its Berlin sub-office. The postal addresses are as follows:

(i)	(ii)	(iii)
European Patent Office 80298 MUNICH GERMANY	European Patent Office Postbus 5818 2280 HV Rijswijk NETHERLANDS	European Patent Office 10958 BERLIN GERMANY
Fax: +49 89 2399-4465	Fax: +31 70 340-3016	Fax: +49 30 259 01-840

(b) The notice of appeal must contain the name and address of the appellant in accordance with the provisions of Rule 41(2)(c) EPC, an indication of the decision impugned, and a request defining the subject of the appeal. In the statement of grounds of appeal the appellant shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based (R. 99(1) and (2) EPC). The notice of appeal and any subsequent submissions stating the grounds for appeal must be signed (R. 50(3) EPC).

(c) Notice of appeal can be filed in accordance with Rule 1 and Rule 2(1) EPC, by delivery by hand, by post, or by technical means of communication. The filling has to comply with the details and conditions and, where appropriate, any special formal or technical requirements laid down by the President of the European Patent Office (R. 99(3) EPC).

(d) The fee for appeal is laid down in the Rules relating to Fees. The schedule of fees and expenses of the EPO or a reference to the current version is regularly published in the Official Journal of the European Patent Office under the heading "Guidance for the payment of fees, expenses and prices". It is also published on the EPO Internet page under http://www.epo.org/Patents/Grant-procedure/Filing-an-application/costs-and-fees.html.

annex 1

Europäisches Patentamt
GD 2

European Patent Office
DG 2

Office européen des brevets
DG 2

LITERATURBOGEN / CITATION SHEET / LISTE DES ANTERIORITES

Anmeldenummer/Application No/Numéro de la demande : **04025099.5**

Vom/Von den Einsprechenden wurden folgende neue Entgegenhaltungen genannt:
The opponent(s) has/have cited the following additional material:
Nouvelles antériorités citées par l'opposant (les opposants) :

Einsprechender Opponent Opposant	Blatt Sheet Feuille	Entgegenhaltungen Citations Antériorités	Erscheinungstag Date of Publication Date de publication	Bemerkungen Remarks Observations
01				

E1 Journal of Food Protection, Vol. 60, No. 8, 1997, Pages 928-934, PETERSON et al. Publication Date; August 1997

E2 Webster's third new international dictionary, 1993, page 2527.

E3 US 5,268,189 Publication Date: December 7, 1993

E4 US 2,546,428 Publication Date: March 27, 1951

E5 RD 235012 (Research disclosure) Publication Date: November 10, 1983

E6 US 4,840,805 Publication Date: June 20, 1989

E7 US2002/0061412 Publication Date: May 23, 2002

E8 GB 2 343 611 Publication Date: May 17, 2000

E9 US 3,852,486 Publication Date: December 3, 1974

annex 2

panded flexible pouches may be forced by pressure to come into contact with the walls of the pasteurisation unit and scratch its surface.

[0023] On the other hand, having flexible pouches with too little air, a vacuum, or a modified atmosphere where air is replaced with an inert gas is not a sensible option because of the anaerobic bacteria hazard discussed above.

[0024] The flexible pouch may have an air to meat ratio of up to 43% by volume. However, experiments with flexible pouches have shown that a desired volume of air to volume of meat ratio is about 20% by volume. This value is calculated by dividing the volume of free air space in the pouch by the volume of crabmeat placed in the pouch, as illustrated in the background section above. This amount will allow enough spoilage to occur after temperature abuse to inhibit, or preferably prevent, undetected anaerobic bacteria growth while yielding a manageable pouch during pasteurisation and for selling to consumers. Lowering the levels of air too much below 13% may increase the possibility for undetected anaerobic bacteria growth, even though experimentation with flexible pouches have shown that ratios of air to meat as low as 6% have still allowed for spoilage to occur after temperature abuse. Air to meat ratios above 20% in flexible pouches, even though favourable to aerobic bacterial growth, are susceptible to the inflation problem discussed above. The experimental laboratory results for flexible pouches discussed above have been obtained using organoleptic and plate count tests at various air to meat ratios.

[0025] Although the present invention has been described using a flexible pouch, the use of other vessels in accordance with the present invention may become obvious to those skilled in the art. Such vessels may include metal cans, plastic cups, and the like. The present invention includes the method for packaging crabmeat using these vessels by optimising the amount of air in the container to reducing the harmful effects of both aerobic and anaerobic bacterial growth.

[0026] The commercial implementation of the present invention utilises a partial vacuum to seal the flexible pouches. There are many adequate partial vacuum apparatus. The partial vacuum process should allow the packager to adjust the level of vacuum applied to the pouch, the time this vacuum pressure is applied, and the time the heating element of the sealing bar is applied to the pouch. These variations will result in an air to meat ratio within the package at a desired ratio upon the sealing of the package. In one such embodiment the process utilises the following conditions: a vacuum pressure chamber set to 0.045 mPa, a 1 second vacuum time, and 1.25 second sealing time. Any multitude of combinations of each of these parameters is possible to achieve the desired results.

[0027] The pasteurisation step is a moderate heat process that destroys most bacteria and other spoilage organisms resulting in the extension of the refrigerated shelf life of the packaged product. The mildness of the heat process allows the product to maintain its fresh appearance, taste, texture, moisture, colour and smell. Another process for treating packaged foods is sterilisation. The sterilisation process, however, is much more severe and virtually destroys all microorganisms and spores that could cause spoilage, but it would render the appearance and quality of the crabmeat unappealing. The pasteurisation process, however, does not completely destroy all pathogens and its spores. Therefore, pasteurised products, unlike sterilised products, still require refrigeration and have only a limited shelf life compared to sterilised products.

[0028] The pasteurisation step of the present invention is directed to destroying pathogenic microorganisms and spores while maintaining the fresh appearance and texture of the crabmeat product. Pasteurisation times and temperatures vary depending on the vessel type, initial crabmeat temperature, as well as many other variables. In an embodiment of the present invention, a pasteurisation time of about 80-160 minutes at a temperature of about 85 to 87°C (185-189°F) is used for crabmeat packaged in a flexible pouch. A pasteurisation time of 120-140 minutes at a temperature of about 87-89°C (188-192°F) may be used for crabmeat packaged in a metal can. A pasteurisation time of approximately 160 minutes at a temperature of about 83-84°C (182-184°F) may be used for crabmeat packaged in a plastic container.

[0029] Although this invention is shown and described with respect to certain embodiments, it is obvious that equivalents and modifications will occur to those skilled in the art upon reading and understanding this specification and claims. The present invention includes all such equivalents and modifications and is limited only by the scope of the claims.

Claims

1. A method for packaging crabmeat comprising the steps of:

   providing packaging vessel;
   placing a volume of crabmeat into said packaging vessel;
   adjusting a volume of air within said packaging vessel to obtain an air to crabmeat ratio of 6-43% by volume, where the air to crabmeat ratio is calculated by dividing the volume of free air in the vessel by the volume of crabmeat in the vessel;
   sealing said packaging vessel; and
   pasteurising said sealed packaging vessel.

2. The method of claims 1, wherein said packaging vessel is a flexible pouch.

3. The method of claim 2, wherein said flexible pouch is comprised of a multi-layered film.

4. The method of claim 3. wherein said multi-layered film comprises:

at least one layer of polyethylene terephthalate;
at least one layer of nylon;
at least one layer of aluminium; and
at least one layer of cast polypropylene.

5. The method of any of claims 3 to 4 wherein said sealing step includes the use of a partial vacuum.

6. The method of any of claims 1 to 4 wherein said air to crabmeat ratio is 20% by volume.

7. The method of any of claims 1 to 4 wherein said air to crabmeat ratio is 13- 20% by volume.

8. A packaged crabmeat product comprising:

a packaging vessel;
a volume of crabmeat placed into said packaging vessel; and
a volume of air within said packaging vessel, said volume of air being such that the air to crabmeat ratio within the vessel is 6-43% by volume, where the air to crabmeat ratio is calculated by dividing the volume of free air in the vessel by the volume of crabmeat in the vessel, and wherein said packaging vessel is sealed and pasteurised.

9. The packaged crabmeat product of claim 8 wherein said packaging vessel is a flexible pouch.

10. The packaged crabmeat product of claim 9 wherein said flexible pouch is comprised of a multi-layered film.

11. The packaged crabmeat product of claim 10 wherein said multi-layered film comprises:

at least one layer of polyethylene terephthalate;
at least one layer of nylon;
at least one layer of aluminium; and
at least one layer of cast polypropylene.

12. The packaged crabmeat product of any of claims 8 to 11 wherein said air to crabmeat ratio is 20% by volume.

13. The packaged crabmeat product of any of claims 8 to 11 wherein said air to crabmeat ratio is 13-20% by volume.

Patentansprüche

1. Verfahren zum Verpacken von Krabbenfleisch, welches die Schritte umfaßt:

Bereitstellen eines Verpackungsbehälters;
Einbringen eines Volumens Krabbenfleisch in den Verpackungsbehälter;
Einstellen eines Luftvolumens im Verpackungsbehälter, um ein Verhältnis von Luft zu Krabbenfleisch von 6-43 Vol.-% zu erreichen, wobei das Verhältnis von Luft zu Krabbenfleisch berechnet wird durch Dividieren des Volumens an freier Luft im Behälter durch das Volumen an Krabbenfleisch im Behälter;
Verschließen des Verpackungsbehälters; und
Pasteurisieren des verschlossenen Verpakkungsbehälters.

2. Verfahren nach Anspruch 1, **dadurch gekennzeichnet, daß** der Verpackungsbehälter ein flexibler Pouch ist.

3. Verfahren nach Anspruch 2, **dadurch gekennzeichnet, daß** der flexible Pouch aus einem mehrschichtigem Film besteht.

4. Verfahren nach Anspruch 3, **dadurch gekennzeichnet, daß** der mehrschichtige Film umfaßt:

wenigstens eine Schicht aus Polyethylenterephthalat;
wenigstens eine Schicht aus Nylon;
wenigstens eine Schicht aus Aluminium; und
wenigstens eine Schicht aus gegossenem Polypropylen.

5. Verfahren nach einem der Ansprüche 3 bis 4, **dadurch gekennzeichnet, daß** der Verschlußschritt die Verwendung eines Teilvakuums einschließt.

6. Verfahren nach einem der Ansprüche 1 bis 4, **dadurch gekennzeichnet, daß** das Verhältnis von Luft zu Krabbenfleisch 20 Vol.-% beträgt.

7. Verfahren nach einem der Ansprüche 1 bis 4, **dadurch gekennzeichnet, daß** das Verhältnis von Luft zu Krabbenfleisch 13-20 Vol.-% beträgt.

8. Verpacktes Krabbenfleischprodukt, welches umfaßt:

einen Verpackungsbehälter;
ein Volumen an Krabbenfleisch, das in den Verpackungsbehälter eingebracht ist; und
ein Luftvolumen im Verpackungsbehälter, wobei das Luftvolumen derart ist, daß das Verhältnis von Luft zu Krabbenfleisch im Behälter 6-43 Vol.-% beträgt, wobei das Verhältnis von Luft zu Krabbenfleisch berechnet ist durch Dividieren des Volumens an freier Luft im Behälter durch

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Applicant/Proprietor	
John Keeler &Co., Inc.	

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